Even if irrelevant and malicious, as in every other case of defamation, truth is an absolute defense. It is submitted that the qualification imposed by the American view fritters away the privilege so as to make it almost valueless. A witness while on the stand must decide at his peril the relevancy of his remarks and stand a jury trial as to his good faith. The English view is simpler, more easily understood and applied, and is not fraught, as the American courts seem to think, with danger to the good name of the individual.

This interesting question has recently been decided by the Supreme Court of Ohio in the case of *Kintz* v. *Harriger* (Ohio), 124 N. E. 168. In this case the defendant gave evidence before a grand jury, from which evidence an indictment was found. The evidence was false and was known to be false when given. The accused was acquitted of the charge and later brought an action of malicious prosecution against the defendant. The court held that such false statements made before the grand jury were not privileged and that the defendant was liable in damages to the person so defamed. The court admitted that its position was *contra* to all precedent and based its decision on the ground of public policy, citing no authorities to sustain the view thus advanced. It is believed that the great weight of authority upholds the other view and protects these statements by making them absolutely privileged.[22] Under this better rule, therefore, such statements as were made in the instant case could not serve as a foundation for an action of malicious prosecution.

It seems that a case exactly in point has never come before the Virginia court so that the question remains undecided in that jurisdiction.[23]

FEDERAL JURISDICTION OVER AN INTERVENING PARTY WHEN THE ORIGINAL CAUSE IS WITHIN FEDERAL JURISDICTION ON THE GROUND OF DIVERSE CITIZENSHIP.—The framers of the Constitution of the United States, with their farseeing wisdom, provided for the creation of the Federal Courts.[1] And, not content with a bare creation, they went further and provided the grounds of jurisdiction.[2]

Among the provisions thus formulated, we find that the Federal Courts have jurisdiction of all questions arising between citizens of different States. The Constitution provides that "The Judicial Power shall extend to all cases * * * between citizens of different

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[22] See English and American authorities, *supra*. While the action in the instant case is in malicious prosecution, it seems that the question is the same as if it were brought in libel or slander. Especially does this seem true under the Ohio decisions. Lanning *v.* Christy, 30 Ohio St. 115, 27 Am. Rep. 431. For the Ohio doctrine see also Liles *v.* Gaster, 42 Ohio St. 631.

[23] Even *dicta* on the question are rare in Virginia. But see Dillard *v.* Collins, 25 Grat. 343, 352; Williams Printing Co. *v.* Saunders, 113 Va. 156, 176, 73 S. E. 472, 476.

[1] Constitution of the United States, Art. 111, § 1.

[2] Constitution of the United States, Art. 111, § 2.

States." [3] That is, a citizen of one State, wishing to sue a fellow citizen of another State, has the privilege of bringing that suit in the Federal Courts, thus removing the entire cause from any local prejudice that might attach on either side. It also has the salutary effect of preventing any friction between the sovereignties involved by reason of unfair dealing in regard to their respective citizens. That this provision of the Constitution is a wise one, is proven by the great number of cases that are brought to the Federal Courts on that ground. This goes to show that the citizens of the several States appreciate the opportuntiy to be heard before a tribunal which has no reason to be biased because of close association with the litigating parties, and, accordingly, they avail themselves of this opportunity.

In construing this jurisdictional provision, the courts have established the firm rule that any controversy having more than one party plaintiff or defendant must conform to this general provision; that is, all parties on one side must be citizens of different States from parties on the other side.[4] In *Strawbridge* v. *Curtiss*,[5] Chief Justice Marshall, in referring to this jurisdictional clause of the Constitution, said:

> "The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued in the Federal Courts. That is, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in those courts."

Since the effect of this construction would be to effectively curtail litigation in the Federal Courts when the *real* litigants had a right to sue there, the provision has been modified to provide that unnecessary and formal parties would not defeat jurisdiction where the real parties, that is, the indispensable parties, were citizens of different States.[6]

But not content with this, the courts themselves provided for a further modification of the rule above announced in the case of interveners, cross complainants and others of like nature. In such cases the rule is firmly established that one or more litigants may intervene in a pending suit between citizens of different States to protect their rights, and such intervention will not defeat jurisdiction, even though the intervening party is a citizen of the same State with one of the defendants.[7]

The reason for such a holding is that jurisdiction once acquired on the ground of diversity of citizenship, puts the case properly

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[3] Art. 111, § 2.

[4] Strawbridge *v.* Curtiss, 3 Cranch (1806) 267; Petterson *v.* Chapman, 13 Blatchf. 395, Fed. Cas. 11042; Key West, etc., Ass'n *v.* Rosenbloom, 171 Fed. 296.

[5] *Supra.*

[6] Mason *v.* Dullagham, 27 C. C. A. 208, 82 Fed. 689; Cilley *v.* Patten, 62 Fed. 498.

[7] Freeman *v.* Howe, 24 How. 450; Phelps *v.* Oaks, 117 U. S. 236, 6 Sup. Ct. 714; Osborne & Co. *v.* Barge, 30 Fed. 805; Sioux City Terminal, etc., Co. *v.* Trust Co., 82 Fed. 124.

before the court and the subsequent introduction of parties cannot affect the jurisdiction thus lawfully acquired.[8]

The rule is eminently sound. When a court takes cognizance of a case, it has, as it were, taken it under an authority paramount to any questioning tribunal. It, and it alone, is the judge of its jurisdictional features. Having determined its right to hear the case, no one can gainsay this jurisdiction except a tribunal of higher authority.

An interesting and somewhat complicated question arises when we consider the right of an intervener to proceed to final judgment when the original suit has failed. Suppose, for instance, that A. brings a suit against B., C. and D. in the Federal Courts on the ground of diversity of citizenship, and alleges that he is a stockholder in the corporation B. The allegations of the bill show, on demurrer, that A. is not a stockholder and his suit is dismissed. Prior to the hearing on demurrer, X. and Y., who are stockholders and who are citizens of the same State as B., C. and D., intervene, joining in A.'s prayer for a receiver and an accounting. Assuming that grounds sufficient to make out the case are alleged, the question then arises as to whether or not the court has jurisdiction over the claims of X. and Y.

Stated briefly, then, the question is, whether or not an intervener, a citizen of the same State as defendant, has a jurisdictional right to proceed to final judgment, when the original proceedings, instituted on the ground of diversity of citizenship, have failed. The question is, indeed, one quite difficult of solution. If the intervention suits may be properly regarded as original, and the jurisdiction, dependent upon diversity of citizenship, as having attached, then the court would have an undoubted right to proceed to final judgment or decree, regardless of the citizenship of the parties in intervention.

The fallacy in this argument would seem to lie in regarding the intervention suits as original. On principle it would certainly seem that such suits are merely ancillary to the main suit, which is dependent upon the diverse citizenship of the litigating parties for its jurisdiction.[9] If this be true, then the ancillary or intervention suits would fall with the dismissal of the original suit, and no final judgment or decree could be entered thereon.

[8] In Phelps *v.* Oaks, *supra*, Mr. Justice Matthews, in delivering the opinion of the court said: "And this need not arrest or interfere with the jurisdiction of the court, already established by the plaintiff against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired, and auxiliary to it, as in like cases, in equity, one interested in the subject matter, though a stranger to the litigation, may be allowed to intervene *pro interesse suo*."

[9] Freeman *v.* Howe, *supra*. In delivering the opinion of the court, Mr. Justice Nelson said: "The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties."